79-2043

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
Misc. No. 79-2043

WIGGINESS, INC., SPARTACUS SPA, INC., LEA FACILITIES, INC., AL SIGELOW, d/b/a GREENWOOD ENTERPRISES, NEW WAVE SOCIAL CLUB, INC., PRIMERO CONSTRUCTION CORP.,

Petitioners,

-against-

IRWIN FRUCHTMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF BUILDINGS OF THE CITY OF NEW YORK, ALLEN G. SCHWARTZ, INDIVIDUALLY AND AS CORPORATION COUNSEL OF THE CITY OF NEW YORK, ROBERT McGUIRE, INDIVIDUALLY AND AS POLICE COMMISSIONER OF THE CITY OF NEW YORK, and EDWARD TRICOMI,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF FACTS

(a)

The challenged amendments to the Zoning Resolution of the City of New York,* see Petition, Appendix C, were the culmination of several years of study and consideration by the New York City Planning Commission of problems associated with the proliferation, particularly in Midtown Manhattan, of purported physical-culture uses which were in reality houses of prostitution. At hearings held in 1976, testimony was presented to the Commission by numerous civic, community and business groups, as well as individual property owners, that these uses, commonly known as "massage

* This is the City's basic zoning ordinance.

parlors," were having a detrimental impact on other business and residential uses. Massage parlors had in recent times taken increasingly street-visible locations and were employing aggressive advertising practices, such as the distribution of sexually explicit handbills. Owners of various types of legitimate businesses in and near the Theatre District complained that they were finding it increasingly difficult to attract and retain qualified employees to work in the area, and at least one major hotel found it so difficult to attract guests that it was forced to close. Owners of the large office buildings and residential developments found that they were no longer able to obtain

market rentals. And, since 1965, the year when the proliferation of massage parlors had accelerated most sharply, there had been no major new investment in redevelopment of real estate in the area. There was a significant trend toward loss of business and jobs, loss, as evidenced by a drop in sales income, relocation by a number of firms, and a corresponding decline in both property and sales tax receipts (A90).*

Prompted by these findings, the Commission proposed, and the New York City Board of Estimate adopted on January 8, 1976, various interim

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* Unless otherwise indicated, numbers in parentheses refer to pages in the Appendix of the Appellants in the Court of Appeals.

amendments to the Zoning Resolution designed to contain the problem until a fuller consideration could be given to a solution. In essence, these interim amendments simply contained the problem by limiting certain types of physical culture uses (including massage establishments) to traditional types of locations (such as hotels) and to certain districts (essentially Midtown west of Sixth Avenue).

As a result of a vigorous enforcement program under these amendments, the number of massage parlors in Midtown declined during the ensuing three years from several dozen to approximately eight (A91). The blight which had particularly afflicted Eighth Avenue in the Forties, as well

as the neighboring commercial and business districts, which are so vital to the economic life of the City, was felt to have been diminished, and there were new infusions of capital into the Midtown area for a number of important development projects.

In 1978, the City Planning Commission had completed its study of the matter, and proposed amendments to the Zoning Resolution designed to deal with the massage parlor phenomenon on a permanent basis (A150-156). Its findings and proposals were accepted by the Board of Estimate (A91), which adopted a resolution on November 16, 1978, amending the Zoning Resolution as proposed by the Commission (A91, A150-56).

The amendments established uniform, city-wide standards for physical culture establishments. The prior moratorium on establishment of such uses was repealed, and a new definitional distinction was made between "physical culture establishments" and "adult physical culture establishments" ("APCEs"). Petition, Appendix C.*

In addition to the five exceptions contained in the definition, a sixth exception has

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* The last sentence of the APCE definition appears to have been omitted from quotations of it in the Petition and Appendix C to the Petition. It reads:

> "Adult Physical Culture establishments, except as provided in this Resolution, are not permitted in any District."

been agreed to on behalf of the City, as a result of litigation in state court, for premises used or operated by licensed masseurs and masseuses.

The amendments completely disallow the commencement of new APCE's within the City of New York by simply not including these as a permitted use within any "Use Group" contained in the Zoning Resolution. In addition, an amortization provision requires all existing APCE's to be terminated within one year of the amendments' effective date, November 16, 1978. Zoning Resolution §52-76. New physical culture uses (other than APCE's) may be commenced by special permit from the New York City Board of Standards and Appeals, except for

gymnasiums used for basketball, handball, squash and tennis, which may be established as-of-right in appropriately zoned districts. Zoning Resolution §§32-31, 32-18.

(b)

Petitioner Wigginess Inc. is a New York corporation which has for some five years operated a so-called leisure and health spa, under the name "Spartacus Spa," at leased premises at 8 East 36th Street in Manhattan. Petitioner Spartacus Spa, Inc., a New York corporation, has operated a purported leisure spa, also under that name, for some three years at premises located at 46 East 55th Street in Manhattan. Both establishments cater entirely, or almost entirely, to male

patrons, and virtually all of their hostesses and attendants are female (A14, A52-53).

Handbills circulated by the two Spartacus Spas show that both have offered services consisting of rubs and baths administered by females hostesses to their male patrons (A162-164). While it was insisted in the District Court by counsel for petitioners that opposite-sex massage is no longer offered by the petitioners, it was, nevertheless, candidly admitted that they do offer "baths on a cross-sexual basis" (A103).

Lea Facilities, Inc., is a New York not-for-profit corporation which operates a purported health club, known as "Gramercy East", at leased premises at 122 East 22nd Street in

Manhattan. Petitioner Al Sigelow, who is the president of Lea Facilities, also operates (d/b/a Greenwood Enterprises) a leisure and health spa, under the name of "Taj Mahal", at leased premises located at 10 West 46th Street in Manhattan. The Taj Mahal premises are equipped with showers and baths, while the Gramercy East location contains "a gym, pool, sauna, locker rooms, showers, etc." (A55-56). Both operations employ more than 15 employees, virtually all of whom, with the exception of managerial personnel, are women (A55-56). These women act as bath attendants and hostesses, and their duties purportedly include manicures, facials, sun lamp treatments, and toweling services. These establishments cater primarily or exclusively to male customers

(A57). In his affidavit, Sigelow states that the male and female patrons and members of these establishments "prefer these services rendered by females rather than males" (A57).

New Wave Social Club Inc. is a New York not-for-profit corporation which conducts a purported social club at subleased premises at 144 West 55th Street in Manhattan. New Wave, in the words of the Complaint, "caters to both male and female members who indulge among themselves in the activities prohibited by the Ordinance" (A15). In an affidavit, Edward Sommerfeld, president of New Wave, describes the club "as a 'swingers club' in which its members exercise a minimum of sexual self restraint in pursuit of a common desire to enjoy themselves

and each others company without repressions or inhibitions" (A35-36). In the Complaint, New Wave admits that "its female members and male members do, among other things, participate with each other in the performance of at least one of the specifically enumerated activities prohibited by the Ordinance" (A14).

Petitioner Primero Construction Corp. is the lessee of the vacant third, fourth and fifth floors of the building located at 143 West 44th Street in the Borough of Manhattan. The lower two floors of the building are occupied by another self-styled "swingers club" known as "Xtazy," which is owned and managed by the President of Primero, Fred Fredericks (A82).

In 1979, Primero submitted a set of plans for approval to the New York City Department of Buildings purportedly for one apartment to be constructed on each floor. These plans were disapproved by the initial Buildings Department plans examiner who reviewed them. Contrary to normal construction industry practice in the City of New York, no attempt was thereafter made by Primero's architect to respond to the original examiner's objections, either by demonstrating compliance or revising the plans, nor was any attempt made to pursue either available administrative or judicial remedies to review the disapproval. This is especially significant in light of the fact that there was a factual dispute between the

parties in the District Court as to the precise reasons for the disapproval of these submitted plans. Petitioner Primero's president, Fred Fredericks, contended that it was solely because of an unwarranted assumption that the three floors would be used as an APCE (A47). In contrast, it was contended on behalf of respondents that Primero's plans were rejected by the plans examiner for more than a dozen stated reasons, most of which had to do with apparent noncompliance with various provisions of the Building Code, including one section which prohibits placing a residential use above a two-story commercial use in a structure of the type involved (A81-82). Accordingly, it was suggested by respondents in the District Court that the Court abstain from taking jurisdiction with

respect to the claims of Primero, so that the latter could pursue the possibly dispositive available administrative and state judicial review remedies before being permitted to raise its constitutional claims (A82). Also, respondents conceded in the Court of Appeals that since retention of jurisdiction is normally appropriate in Pullman-type abstention, they would "have no objection to modification of the order appealed from to provide that the dismissal of Primero's claims was without prejudice to its right to litigate its overbreadth or vagueness claims at the conclusion of the state proceedings." Brief of Appellees in the Court of Appeals, p. 18. See American Trial Lawyers v. N.J. Supreme Court, 409 U.S. 467, 469 (1973).

POINT I

THE PETITIONERS LACK STANDING TO CHALLENGE THE AMENDMENTS UPON GROUNDS OF OVERBREADTH*

(a)

Relying upon Broadrick v. Oklahoma, 413 U.S. 601 (1973), the District Court held that petitioners Wigginess, Spartacus, Sigelow, Lea and New Wave lacked standing to challenge the subject ordinance upon grounds of overbreadth since they admit either that they provide opposite-sex massages or offer facilities for possible massaging by club members of the opposite sex. 482 F. Supp., at 690 and

* Petitioners have abandoned in this Court their claims asserted in the District Court that the activities here sought to be prohibited by the City are themselves constitutionally protected. See 482 F. Supp., at 687-90; Pet. App. 18a-30a.

footnote 14; Pet. App. 32a, 48a. These petitioners insist that they do not offer "body rubs, alcohol rubs, or massages to their patrons or members," Petition, at 6, and that, therefore, the District Court erred in its underlying assumptions for finding such lack of standing, id., at 8. Despite petitioners' counsel's affidavit stating that petitioners no longer provide opposite-sex massage services (A103), the Complaint itself contains much from which the District Court could reasonably have concluded for the purpose of determining overbreadth standing that the first five petitioners do indeed admit that they provide, or make available facilities for, opposite-sex massage, rubs or bathing.

It is admitted in paragraph 33 of the Complaint that the members of New Wave Social Club "indulge among themselves in the activities prohibited by the Ordinance" (A15). (Emphasis added)

In paragraph 32 it is alleged (A15):

> "32. Although plaintiff, Lea Facilities Inc. serves some female members, the incidence of their desiring the prohibited services specified in the Ordinance is so rare as to mandate the firing of almost all of the women employees of the club solely on the basis of their sex by reason of the prohibition contained in the Ordinance." (Emphasis added)

If Lea will be required to fire its female employees unless they can be allowed to perform the "prohibited services" on its male customers, then, manifestly, such services are at present being provided.

It is alleged in paragraph 27 of the Complaint that with the exception of the premises occupied by Primero and New Wave "all of the aforesaid premises occupied by the other plaintiffs herein include among the services to their patrons or members at least one of the specifically outlawed activities specified in the Ordinance * * * " (A13). (Emphasis added.) Petitioners' admissions and, indeed, the very character of their enterprises unquestionably demonstrate that the present uses of their respective premises fall squarely into the category of activities prohibited by the ordinance.

However, even accepting as true petitioners' assertion that none of them now provides, or plans to provide, or offers facilities for,

"massages or rubs" performed by members of the opposite sex, four of the petitioners candidly admitted in the District Court that they "do offer baths on a cross-sexual basis" (A103), and, even now, it is stated with respect to all of the petitioners that their premises either are, or would be, equipped or arranged so as to be usable for "cross sexual baths", Petition, at 10. Thus, even if petitioners do not now provide, or offer facilities for, massages, rubs and similar treatment by members of the opposite sex, they do admittedly provide, plan to provide, or offer facilities for, bathing performed by members of the opposite sex. Given this admission, it is clear under the authorities discussed below that petitioners lack standing to challenge the

subject ordinance upon grounds of overbreadth, since the challenged ordinance prohibits the use of premises for establishments offering opposite-sex bathing as well as massages and rubs. Zoning Resolution §12-10 (definition of Adult Physical Culture Establishment).

The general, traditional rule of standing in constitutional adjudication "is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

The basis for petitioners' overbreadth claims is capsulized in their assertion that the definition

of Adult Physical Culture Establishments contained in Zoning Resolution §12-10 is worded so broadly that it would embrace every premises within the City. Petition, at 11. However, petitioners' own premises fall into a much narrower category as to which there can no longer be any reasonable dispute on the question of its proper includability in a narrowly drawn ordinance, namely commercial establishments offering opposite-sex massage and/or bathing. Colorado Springs Amusement, Ltd. v. Rizzo, 524 F. 2d 571 (3d Cir. 1975), cert. den., 428 U.S. 913 (1976); City of Indianapolis v. Wright, 371 N.E. 2d 1298 (Ind.), appeal dismissed for want of substantial federal question, 439 U.S.

804 (1978). Thus, in order to be permitted to challenge the APCE ordinance upon the grounds of overbreadth, petitioners must establish that the challenged ordinance's deterrent effect on legitimate expression is "both real and substantial" and that it is not "readily subject to a narrowing construction by the state courts." Young v. American Mini Theatres, 427 U.S. 50, 60 (1976). This they have failed to do.

In light of the clarity of the APCE definition and its six well-defined categories of exceptions, supra, 8, it is entirely unreasonable to conclude that the challenged ordinance will have either a real or substantial effect on protected expressive or associational activities. It is extremely doubtful that a wife or

girlfriend would be deterred from giving her husband or boyfriend an alcohol rub in a private apartment for fear of violating the ordinance, as petitioners intimate they could be, Petition, at 12.

As a matter of constitutional adjudication, the Federal Courts will refuse to entertain an overbreadth claim, even where a state law is found to exceed First Amendment bounds, where it is possible for the state court to delimit a precise category of protected activity to which the challenged statute may not apply. Time, Inc. v. Hill, 385 U.S. 374, 397 (1967). Here such a precise category can be formulated, if necessary, by the saving construction that the challenged definition was not intended

to embrace literally any premises in which it is physically possible to give a nod, but only those used by an establishment, club or business which offers, advertises, or is equipped or arranged for the intended purpose of providing ("so as to provide") the prohibited services. Certainly, the legislative history and intent, supra, 2-9, of the ordinance lends itself readily to such a saving construction.* Since, at most, the

*Petitioners' hypothetical examples of how the ordinance might be applied to infringe upon protected activities also ignore the clear cut distinction between a zoning use and personal activity generally. A use in the zoning sense is a continous, dominant activity to which a parcel or segment of real property may be devoted, while the example of a wife or girlfriend massaging her husband or boyfriend in the privacy of a residence is purely personal conduct and thus irrelevant to the challenged zoning provisions.

challenged ordinance impinges on conduct rather than speech and the conduct aimed at is well within the scope of regulable activity, the possibility for such a saving construction may be indulged, Broadrick v. Oklahoma, 413 U.S. at 615-16; for, any overbreadth, if real, certainly may not be said to be "substantial." "[W]hatever overbreadth which may exist should be cured through case-by-case analysis of fact situations to which its sanctions, assertedly, may be applied." Ibid.; see, also, Young v. American Mini Theatres, 427 U.S. 58-61.

POINT II

PETITIONERS ALSO LACK STANDING TO CHALLENGE THE ORDINANCE AS VOID FOR VAGUENESS.

Petitioners state in their Reasons for Granting the Writ, Petition, at 12-13:

> It cannot be overemphasized that the evil of the ordinance herein is not traditional concept of vagueness, i.e., that its proscription cannot be understood, it is in its overbreadth, i.e., in that it is so all encompassing that it covers any premises .... It cannot be the subject of dispute that each of the Petitioners fall squarely within the proscription of this ambiguous but overbroad ordinance.

Similarly, it is also stated, Petition, at 10:

> Five petitioners admit that their premises are equipped or arranged so as to be usable for cross sexual baths and the sixth seeks a building permit for construction which would make it usable for such purpose, a pur-

> pose explicitly proscribed by the ordinance in the clearest most unequivocal terms.

Thus, petitioners are attempting a frontal attack for vagueness on the ordinance while simultaneously conceding the applicability of the ordinance to their own actual or intended uses. It is well settled that, unlike the overbreadth doctrine, which aims to protect the First Amendment rights of uninvolved third parties, the void-for-vagueness doctrine, as a species of denial of due process on account of lack of notice, may not be invoked by one to whose conduct the statute indisputably applies. Young v. American Mini Theatres, supra, 427 U.S. at 58-59; Parker v. Levy, 417 U.S. 733, 756 (1974).

POINT III

ABSTENTION WAS PROPER AS TO THE OVERBREADTH AND VAGUENESS CLAIMS OF PETITIONER PRIMERO.

With respect to Primero's claims of overbreadth and vagueness, the District Court abstained for two reasons. First, the Court noted, quite properly, that denial of Primero's building permit is subject to administrative review and, if necessary, judicial scrutiny under Article 78 of N.Y. C.P.L.R. (McKinney). 482 F. Supp., at 686-87; Pet. App. 17a. Second, while finding no facial invalidity in the ordinance, id., at 687; Pet. App. 17a-18a, the Court expressed the view that "without a limiting construction the ordinance could possibly be read to apply to establishments in which there would be none of the opposite-sex massaging the City seeks to prohibit," id., at 690; Pet. App. 31a-32a. Finding,

nevertheless, that the ordinance "can be construed by the state courts to eliminate any constitutional issue," id., at 687; Pet. App. 18a, the Court declined to exercise its jurisdiction under the rubric of Pullman-type abstention.

Since Primero itself has raised the strained construction* by which it attempts to argue that the challenged ordinance is overbroad, it should be required, in the interests of comity and federalism, to determine in State Court in the first instance whether such construction would be followed. If they are not, the Federal Courts need never

*On page 12 of the Petition, for example, petitioners ask, "would a wife or girlfriend be permitted to give her husband or boyfriend an alcohol rub in any of Primero Construction Corp's three apartments if it were permitted to construct such apartments?"

reach the constitutional issues which Primero now seeks to raise.* Bellotti v. Baird, 428 U.S. 132 (1976). As we argue in Point IV below, at 41 et seq., the APCE definition, read as whole, is unlikely to be construed in the state courts in the manner which petitioners' piecemeal and excessively literalistic analysis would indicate. Given such unlikelihood, petitioner Primero should be required to test its constructional challenge of this new and essentially unconstrued ordinance in the state

*Indeed, there is at present pending in the New York supreme Court, Appellate Division, First Department, an appeal raising some of the kind of constructional questions concerning the challenged ordinance as are sought to be raised here. Plaza Health Clubs, Inc. v. City of New York, N.Y.L.J., January 7, 1980, p. 11 (Supp. Ct., N.Y. Co.).

courts before seeking total invalidation of it on constitutional grounds. Bellotti v. Baird, supra, 428 U.S., at 147; Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 306-308 (1979).

It should also be mentioned in this context that Primero's application to the Department of Buildings never proceeded to a final determination which would be ripe for review even in state court (A50-51, A81-82). Nioucel v. Gilroy, N.Y.L.J., Jan. 19, 1955, p. 8 (N.Y. Sup. Ct., N.Y. Co.). An objection to submitted plans by an examiner of the Department of Buildings is only a preliminary query, and is usually resolved, or "cured", by subsequent clarification of the questionable or unclear feature by the submitting architect. In the event the architect is unable to come to an agreement with

the examiner, he can take the matter up with the chief engineer, and if unable to convince the chief engineer, he can consult with the Borough Superintendent, who is always available to resolve such disputes and who can act on behalf to the Commissioner. These procedures are common knowledge to any architect who has praticed in the City of New York. See J. McGoldrick, et al., Building Regulation in New York City: A Study in Administrative Law and Procedure (1944), pp. 245-251. The examiner who reviewed Primero's plans was reasonably concerned by the fact that the "apartments" connected directly with the swinger's club below (A50, A82). Undoubtedly, the arrangement and layout of the rooms suggested that the purported apartments were in reality to be simply a massage parlor. If the

examiner was incorrect in his reading of the plans, his initial objections could, quite possibly, have been successfully challenged in the Department of Buildings itself. It would be precipitous for a court to declare an entire legislative scheme, already determined to be facially valid, invalid based upon the manner of its application in a single instance by a single lower-level official. For this additional reason, the District Court quite properly preferred to have the matter reviewed administratively, as well as judicially, at the local level before addressing itself to the constitutional claims posed. 482 F. Supp., at 686-87; Pet. App. 17a-18a. By thus allowing the matter to become ripe for meaningful review, the

Court's decision comes within a well-established consideration underlying the application of the abstention doctrine. See Moore v. Sims, 442 U.S. 415, 428-29 (1979).

POINT IV

THE CHALLENGED ORDINANCE IS NOT OVERBOARD OR VOID FOR VAGUENESS.

Based essentially upon the use of the phrase "equipped or arranged" in the definition of Adult Physical Culture Establishments, Zoning Resolution §12-10, and without taking account of the explicitly excepted professions, trades and business which are part of the same definition, petitioners facilely conclude that the APCE definition reaches every business and residential use in New York City. Petition, at 10-13. This interpretation is patently unreasonable. Use in the APCE

definition of terms such as "establishment, club or business," "offers or advertises," "provide as part of its services," and "treatment," as well as the specification of the professions, trades and businesses set forth as exceptions to the definition, shows to any person of ordinary intelligence that noncommercial activity is not within the contemplation of the section. Further, the listing of the excepted professions, trades and businesses, which, together with the sixth forthcoming exception for licensed masseurs and masseuses, supra at 8, embrace every conceivable legitimate commercial or professional use which might reasonably be said to include opposite-sex massage, rubs or bathing as part of its services, shows to any person of ordinary intelli-

gence that "every business premise" is not within the scope of the ordinance.*

It is the actual, or intended, activity, occupation, business, or operation carried on in premises, as well as their physical arrangement, which determines their "use" in the zoning sense. See definition of "use" contained in Zoning Resolution §12-10. For this reason the phrase "equipped or arranged" as used in the APCE definition must be read in conjunction with the phrase which follows it: "so as to provide as part of its services, * * *." It is, obviously, not the mere presence of bathing or massage facilities alone which makes

*Petitioners contention that APCE definition might be construed to apply to such trades as manicurists, dental technicians, dentists, registered professional nurses, and dance hostesses, Petition, at 11 and 13, is patently invalid, since Section 12-10 either does not embrace such violations within its scope or specifically exempts them.

premises into an APCE, but the presence of such equipment in premises for the purpose of providing services of "massages, body rubs, alcohol rubs, baths or other similar treatment, by members of the opposite sex."

The test of whether a statute or ordinance is impermissibly vague is whether "men of common intelligence must necessarily guess at its meaning." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). It is impossible, however, to draw a statute which cannot be so tortured or dissected as to yield some unintended application. If the kind of hysterical exegesis which petitioners proffer here for the challenged ordinance were applied generally in void-for-vagueness challenges, it would be almost impossible for any statute or ordinance

to be enforced. What the court stated in CSC v. Letter Carriers, 413 U.S. 548 (1973), at 578-9, applies equally well here:

> "[T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

It should also be noted that the principal danger behind impermissibly vague penal statutes is absent under the type of ordinance at bar. There is no danger that one who is mistaken, or in doubt, about the permissibility of a contemplated use under the APCE provisions risks criminal liability. He or

she need only apply for an appropriate building permit and/or certificate of occupancy before embarking upon a contemplated use, as, indeed, is required by the N.Y.C. Building Code, see 3-A N.Y.C. Admin. Code §§ C26-108.7, C26-109.1, C26-111.2 (1978), to obtain approval and thus avoid any risk of prosecut'on. Hence, the rationale for declaration of invalidity on account of vagueness is absent. See Broadrick. v. Oklahoma, supra, 413 U.S., at 608, n. 7.

Petitioners' assertion that it has been customary for officials of the City of New York to "summarily close down" premises alleged to be use in violation of their certificate of occupancy or the Zoning Resolution through the obtaining of ex parte temporary restraining orders, Petition, at 6, is a gross distortion.

As petitioners and their counsel well know, and, indeed, as was done to one of the petitioners here (A40-41), the almost invariable procedure in the City of New York when the Department of Buildings believes a violation of the Zoning Resolution to be in existence is, as provided for in N.Y.C. Admin. Code §643a-12.0(b), the service of a notice of violation directing the owner to cease such use within ten days. See, for example, People v. Feldman, 11 NY 2d 899 (1962). And such a directive would be subject to administrative review by the Board of Standards and Appeals, with an automatic stay of the Commissioner of Buildings' determination, see N.Y.C. Charter §§ 666(6) and 669. The latter's factual determination is subject to full certiorari review, with

availability of stays pursuant to N.Y. C.P.L.R., Article 78 (McKinney) in the State Courts. 4 N.Y.C. Adm. Code §§668e-1.0. Under such a scheme, it can hardly be said that the dividing line between innocent and condemned conduct must become matter of guesswork or risk.

Petitioners' reliance on cases such as Smith v. Goguen, 415 U.S. 566 (1974), is inappropriate. There, the term "treats contemptuously" used in the challenged flag-contempt statute was of subjectively indeterminate meaning and, hence, failed to provide notice of the conduct prohibited, or standards to guide enforcement officials. The APCE ordinance does not contain any such subjectively indeterminate terms.

The APCE definition is considerably more precise in its terms than the ordinance upheld in Grayned v. City of Rockford, 408 U.S. 104 (1971), which directly threatened protected expressive conduct by making it unlawful for persons near schools in session to "make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class there ...," 408 U.S., at 107-08. The Court found that any vagueness in the terms "noise" or "diversions" in the ordinance was dispelled by the requirement that there be demonstrated interference with school activities. "As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council

has made the basic policy choices, and has given fair warning as to what is prohibited." 408 U.S., at 114. By way of analogy and contrast here, the challenged ordinance, while it does not threaten protected conduct, nevertheless gives fair warning as to what is prohibited, i.e., establishments, businesses or clubs which offer, advertise or provide massages, rubs or baths by members of the opposite sex. And the definition of APCE's contained in the Zoning Resolution, §12-10, is precise enough so as to guide the exercise of judgment by City officials and the courts in construing and applying the ordinance so as to effectuate its ends.

As noted by the District Court, 482 F. Supp., at 687-689; Pet. App. 181-26a, numerous ordinances prohibiting opposite-

sex massage and bathing have been upheld after a wide spectrum of constitutional challenges. City of Indianapolis v. Wright, 371 N.E. 2d 1298 (Ind.), appeal dismissed for want of substantial federal question, 439 U.S. 804 (1978); Smith v. Keator, 285 N.C. 530, 206 S.E. 2d 203, appeal dismissed for want of substantial federal question, 419 U.S. 1043 (1974); Rubenstein v. Township of Cherry Hill (N.J. Sup. Ct., unreported, Jan. 29, 1974) appeal dismissed for want of substantial federal question, 417 U.S. 963; Kisley v. City of Falls Church, 212 Va. 693, appeal dismissed for want of substantial federal question, 409 U.S. 907 (1972). Supreme Court dismissals for lack of substantiality are dismissals on the merits. Hicks v. Miranda 422 U.S. 332 (1975).

Petitioners' attempt to distinguish the instant enactment upon the ground that it is a zoning, rather than penal, ordinance, is without merit. The effect of both types of ordinances is the same, i.e., to totally exclude such types of establishments within the municipality. The zoning approach is, if anything, less severe since it treats the problem not as a criminal offense but as a land-use restriction. The excepted activities contained in the ordinance, including the forthcoming exception for licensed masseurs and masseuses, protect virtually any legitimate establishment which might provide massages, rubs or bathing by members of the opposite sex. It is only a very narrow range of obviously unprotected commercial activity which is

affected by the APCE ordinance. Cf. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 (1973).

The decision of the City Planning Commission to recommend adoption of the APCE ordinance was arrived at after years of study of the massage-parlor phenomenon. The interim measures of the Zoning Resolution which preceded it, as well as the present ordinance, were based upon thorough studies of the problem, and provide more than a rational basis for the conclusion that massage parlors have a decided detrimental effect on surrounding neighborhoods (A133-156). The more immediate effect of loss of business to certain, large adjoining land uses, such as hotels, followed by the closing down of such establishments and consequent loss of jobs, is inexorably followed by

general abandonment by other legitimate uses, loss of redevelopment capital, decline in both property and sales tax receipts, and eventual urban blight (A89-90). The Commission's conclusions, adopted by the Board of Estimate, that massage parlors were having a direct injurious effect on the quality of urban life which could be alleviated only by the total abolition of such uses was thus well based and should, therefore, be accorded considerable latitude by the Court. Young v. American Mini Theatres, supra, 427 U.S., at 71.

CONCLUSION

THE PETITION FOR A
WRIT SHOULD BE DENIED.

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Respectfully submitted,

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